SUPREME COURT OF THE UNITED STATES.

No. 412.

KINZIE BATES, PLAINTIFF IN ERROR,

vs.

WILLIAM H. BROWN.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

INDEX.

	Original.	Print.
Declaration vs. Barnes and Morse	2	1
Record entry; rule to do. to plead	5	2
Declaration vs. Skinner *et al*	7	3
Record entry; rule to do. to plead	10	5
Record entry; causes consolidated and defendant Brown substituted	11	5
Plea of Brown, defendant	12	5
Record entries; hearing of judgment, &c.	13	6
Bill of exceptions	15	6
Appeal bond	36	15
Clerk's certificate	38	15
Writ of error	39	16
Citation and service	41	18

1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court room, in the city of Chicago, in the district aforesaid, before the Hon. Thomas Drummond, district judge of said district, and in the absence pro tempore of the Hon. David Davis, one of the justices of the Supreme Court of the United States, sole judge of said circuit court, on Monday, the twenty-sixth day of November, in the adjourned October term of said court, in the year of our Lord one thousand eight hundred and sixty-six, and of our independence the ninety-first year.

WILLIAM H. BRADLEY, *Clerk.*

KINZIE BATES
vs.
WILLIAM H. BROWN. } Ejectment.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

2 Be it remembered, that on the eleventh day of April, in the year of our Lord one thousand eight hundred and sixty-six, came Kinzie Bates, plaintiff, by his attorneys, and filed in the office of the clerk of the circuit court of the United States for the northern district of Illinois, at Chicago, in said district, his declaration in ejectment against James C. Barnes and Henry W. Morse, defendants, together with a notice, an affidavit and a bond for costs thereto attached, which said declaration, notice, affidavit, and bond are in the words and figures following, to wit:

United States circuit court, March term, A. D. 1866.

UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Kinzie Bates, who is a citizen of the State of Michigan, by Holbrook and Pomeroy, his attorneys, complains of J. C. Barnes and Henry W. Morse, who is a citizen of the State of Illinois, in a plea of trespass and ejectment, for that whereas, heretofore, to wit, on the first day of January, in the year eighteen hundred and sixty-six, (A. D. 1866,) at and within the county of Cook and State of Illinois, the said plaintiff was possessed as of h own demense, in fee simple, of a certain tract or parcel of land, with the appurtenances, situate in the county of Cook in the said State of Illinois, and described
3 as follows, to wit: a part of block one of the original town of Chicago, now city of Chicago, and more particularly described as follows: the east thirty-five feet, of the west sixty feet, of the north ninety-seven feet and ten inches of said block, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee simple. And the said plaintiff being so possessed thereof, the said defendant afterwards, to wit, on the same day and year last aforesaid, entered the said premises and ejected the said plaintiff therefrom, and from the time last aforesaid has unlawfully withheld and does now unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said

plaintiff of the sum of five hundred dollars, and therefore he brings suit, etc.

HOLBROOK & POMEROY,
Attorneys for Plaintiff.

To the above-named defendants:

You are hereby notified that the declaration with a copy of which you are now herewith served, and to which this notice is attached, will be filed in the circuit court of the United States for the northern district of Illinois, April eleventh, A. D. 1866; and that upon filing the same rule will be entered requiring you to appear and plead
4 to the said declaration within twenty days after the entry of said rule; and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in the declaration.

Dated this second day of April, A. D. 1866.

HOLBROOK & POMEROY,
Attorneys for Plaintiff.

50-cent U. S. rev. stamp.

STATE OF ILLINOIS, *Cook County, ss:*

C. C. Pomeroy being duly sworn, says, that on the ninth day of April, A. D. 1866, on the premises above named, he gave to each of the above-named defendants a copy of the within declaration and notice, and that said defendants was then and there in possession of said premises.

C. C. POMEROY.

Sworn and subscribed before me, this 10th day of April, A. D. 1866.

WILLIAM H. BRADLEY, *Clerk.*

Circuit court of the United States, northern district of Illinois, March term, A. D. 1866.

5 KINZIE BATES
vs.
JAY C. BARNES and HENRY W. MORSE

I enter myself security for costs in this cause; and promise to pay all costs which accrue to the opposite party in this action, or to any of the officers of this court, and in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him, I hereby agree and stipulate that execution may issue against my property for any costs taxed against him.

Dated this April 2d, 1866.

MILTON O. HIGGINS.
GEO. C. BATES.

Indorsed: Filed April 11, 1866.

WM. H. BRADLEY, *Clerk.*

On the same day, to wit, the 11th day of April, in the adjourned March term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

KINZIE BATES
vs.
JAY C. BARNES and HENRY W. MORSE. } Ejectment.—7,282.

6 Now comes the plaintiff, by Holbrook and Pomeroy, his attorneys, who file his declaration in ejectment against the defendants, together with a notice thereto attached, and also an affidavit of due service of a true copy of said declaration and notice upon the defendants; and on motion of the plaintiff's attorney it is ordered by the court that this cause be docketed and the defendants ruled to plead within twenty days, or that their defaults be entered.

Be it remembered, that on this day, to wit, the eleventh day of April, A. D. 1866, came Kinzie Bates, plaintiff, by his attorneys, and filed in said clerk's office at Chicago, in said district, his declaration in ejectment against John D. Skinner and Morris F. Skinner, defendants, together with a notice, an affidavit, and bond for costs thereto attached, which said declaration, notice, affidavit, and bond are in the words and figures following, to wit:

United States circuit court, March term, A. D. 1866.

7 UNITED STATES OF AMERICA, *Northern District of Illinois, ss:*

Kinzie Bates, who is is a citizen of the State of Michigan, by Holbrook and Pomeroy, his attorneys, complains of John D. Skinner and Morris F. Skinner, who is a citizen of the State of Illinois, in a plea of trespass and ejectment, for that, whereas, heretofore, to wit: On the first day of January, in the year eighteen hundred and sixty-six, (A. D. 1866,) at and within the county of Cook, and State of Illinois, the said plaintiff was possessed as of his own demesne, in fee simple, of a certain tract or parcel of land, with the appurtenances, situate in the county of Cook, in the said State of Illinois, and described as follows, to wit: A part of block one of the original town of Chicago, now city of Chicago, and more particularly described as follows: The west twenty-five feet of the north ninety-seven feet and ten inches of said block, which said premises exceed in value the sum of five hundred dollars, and which the said plaintiff claims in fee simple. And the said plaintiff, being so possessed thereof, the said defendant afterwards, to wit, on the same day and year last aforesaid, entered the said premises and ejected the said plaintiff there-
8 from, and from the time last aforesaid has unlawfully withheld and does now unlawfully withhold from the said plaintiff the possession thereof, to the damage of the said plaintiff of the sum of five hundred dollars, and therefore he brings suit, etc.

HOLBROOK & POMEROY,
Atty's for Plaintiff

To the above-named defendants:

You are hereby notified that the declaration with a copy of which you are now herewith served, and to which this notice is attached,

will be filed in the circuit court of the United States for the northern district of Illinois, April eleventh, A. D. 1866, and that upon filing the same a rule will be entered requiring you to appear and plead to the said declaration within twenty days after the entry of said rule; and that if you neglect so to appear and plead, a judgment by default will be entered against you, and the plaintiff will recover possession of the premises specified in said declaration.

Dated this second day of April, A. D. 1866.

HOLBROOK & POMEROY,
Att'ys for Plaintiff.

[50-cent revenue stamp.]

9 STATE OF ILLINOIS, *Cook County, ss:*

C. C. Pomeroy, being duly sworn, says that on the ninth day of April, A. D. 1866, on the premises above named, he gave to each of the above-named defendants a copy of the within declaration and notice, and that said defendants was then in possession of said premises.

C. C. POMEROY.

Sworn to and subscribed before me, this 10th day of April, A. D. 1866.

WM. H. BRADLEY, *Cl'k.*

Circuit court of the United States, northern district of Illinois, March term, A. D. 1866.

KINZIE BATES
vs.
JOHN D. SKINNER and MORRIS F. SKINNER.

I enter myself security for costs in this cause, and promise to pay all costs which may accrue to the opposite party in this action, or to any of the officers of this court. And in default of payment by the plaintiff of any costs ordered or adjudged to be paid by him I hereby agree and stipulate that execution may issue against my prop-
10 erty for any costs taxed against him.

Dated this April 2d, 1866.

MILTON O. HIGGINS.
GEO. C. BATES.

Indorsed: Filed April 11, 1866.

WM. H. BRADLEY, *Cl'k.*

On the same day, to wit, the eleventh day of April, in the adjourned March term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause is the following entry, to wit:

KINZIE BATES
vs.
JOHN D. SKINNER and MORRIS F. SKINNER. } 7,283.—Ejectment.

Now comes the plaintiff, by Holbrook and Pomeroy, his attorneys, who file his declaration in ejectment against the defendants, together with a notice thereto attached, and also an affidavit of due service of a true copy of said declaration and notice upon the defendants, and on motion of the plaintiff's attorneys it is ordered by the court
11 that this cause be docketed and the defendants ruled to plead within twenty days, or that their defaults be entered.

And on this day, to wit, the first day of May, in the adjourned March term, A. D. 1866, of said court, in the record of the proceedings thereof in the two aforesaid entitled causes is the following entry, to wit:

KINZIE BATES
vs.
JAY C. BARNES and HENRY W. MORSE. } 7,282.—Ejectment.

KINZIE BATES
vs.
JOHN D. SKINNER and MORRIS F. SKINNER. } 7,283.—Ejectment.

By agreement of the parties, by their attorneys, it is ordered by the court that these two causes be consolidated, and that William H. Brown, the landlord, be substituted as defendant herein.

On this day, to wit, the first day of May, A. D. 1866, came said defendant, William H. Brown, defendant substituted in the place and stead of the former defendants, and filed in said clerk's office
12 his plea in said entitled cause, which said plea is in the words and figures following, to wit:

In the circuit court of the United States for the northern district of Illinois.

WILLIAM H. BROWN
ads.
KINZIE BATES. }

And the said defendant, Mather and Taft, his attorneys, comes and defends the wrong and injury when, &c., and says that he is not guilty of unlawfully withholding the said premises claimed by said plaintiff in manner and form as alleged in said declaration, and of this he puts himself upon the country, &c.

MATHER & TAFT,
Att'ys for Def't.

And the said plaintiff doth the like.

By HOLBROOK & POMEROY,
His Attorneys.

Indorsed: Filed May 1st, 1866.

WM. H. BRADLEY, *Cl'k.*

And on this day, to wit, the 24th day of October, in the adjourned October term, A. D. 1866, of said court, in the record of the
13 proceedings thereof in said entitled cause is the following entry, to wit:

KINZIE BATES
vs.
WILLIAM H. BROWN. } Ejectment.

Now come the parties by their attorneys, and upon issue joined by agreement, they waive the intervention of a jury, and for trial put themselves upon the court; and after hearing the evidence and a part of the arguments of counsel, the further trial of this cause is postponed until to-morrow morning.

And on this day, to wit, the 25th of October, in the adjourned October term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause in the following entry, to wit:

KINZIE BATES
vs.
WILLIAM H. BROWN. } Ejectment.

Now come again the parties by their attorneys, and after hearing the concluding arguments of counsel, the court not being
14 sufficiently advised in the premises, takes time to consider.

And on this day, to wit, the 26th day of November, in the adjourned October term, A. D. 1866, of said court, in the record of the proceedings thereof in said entitled cause, is the following entry, to wit:

KINZIE BATES
vs.
WILLIAM H. BROWN. } Ejectment.

Now come the parties by their attorneys, and the court having considered, and being now sufficiently advised upon the matters heretofore submitted herein, finds the defendant not guilty. It is therefore considered by the court, that the defendant go hence without day, and that he have and recover of the plaintiff his costs by him about his defence in this behalf expended, amounting to the sum of dollars and cents, and that he have execution therefor.

15 On the hearing of said cause, the following exceptions were taken and allowed.

In the circuit court of the United States, northern district of Illinois, October term, A. D. 1866.

KINZIE BATES
vs.
WM. H. BROWN. } Ejectment.

And now this cause came on to be heard and tried upon the following agreed statement of facts, signed by the counsel for the respective parties, and submitted to the court:

1. That on the 29th day of September, A. D. 1830, Alexander Wolcott purchased of the State of Illinois, for one hundred and eighty-five dollars, lots 1, 2, 3, 4, 5, 6, 7, and 8, of block 1, in the original town of Chicago, the same being a part of what are known as "Canal Lands," and of which the demanded premises form a part, and received the usual certificate of purchase issued in such cases.

16 That said Alexander Wolcott deceased October 30th, A. D. 1830, having a daughter, Mary Ann Wolcott, his only child, and his wife, Ellen M. Wolcott, him surviving.

3. That said daughter deceased January 16th, 1832, aged seven years, without issue and intestate.

4. That said Ellen M. Wolcott, the widow of Alexander Wolcott, married George C. Bates, May 26th, 1836.

5. That the plaintiff, Kinzie Bates, was born as the issue of said marriage, April 13th, 1838, and is the only child of his said parents.

6. That said Ellen M. Bates deceased August 1st, 1860, leaving her husband, George C. Bates, then and still surviving.

7. That on the 5th day of July, A. D. 1833, a patent was issued by the governor of the State of Illinois for the lands purchased as aforesaid by Alexander Wolcott, deceased, which was in the words and figures following:

17 *Illinois to heirs of A. Wolcott.*

Vol. A. page 275.

John Reynolds, governor of the State of Illinois, to all to whom these presents shall come, greeting:

Whereas it appears from the certificate of Edmund Roberts, Gershom Jayne, and Charles Dunn, commissioners of the Illinois and Michigan canal, that Alexander Wolcott, deceased, did on the twenty-seventh day of September, in the year eighteen hundred and thirty, purchase of the State of Illinois, for the sum of six hundred and eighty-five dollars, the lots of land hereinafter described, that is to say:

Lots one, two, three, four, five, six, seven, and eight, in block number one, lying and being the town of Chicago, in the State aforesaid, and known on the plan of said town by the aforesaid numbers, which said lot of land is part and parcel of the donation made to the State of Illinois by an act of the Congress of the United States entitled "An act to grant a quantity of land to the State of Illinois, for the purpose of aiding her in opening a canal to connect the

18 waters of the Illinois river with those of Lake Michigan," approved March 2, 1827; and whereas by an act of the general assembly of said State, entitled "An act to provide for constructing the Illinois and Michigan canal," approved January 22, 1829, power is given to the canal commissioners to sell the lands so granted to the State, and the governor is required to execute patents to the purchasers.

Now know ye, that under and by virtue of the powers and authorities contained in the said recited act of the general assembly of the State of Illinois, there is granted to the legal representatives of the

said Alexander Wolcott, deceased, heirs and assigns, the lot of land above described, to have and to hold the same with the appurtenances, to the legal representatives of the said Wolcott, deceased, heirs and assigns forever.

In testimony whereof I have caused these letters to be made patent, and the seal of State affixed. Done at Vandalia this fifth day of July, in the year of our Lord one thousand eight hundred and thirty-three, and of the independence of the United States the fifty-eight.

[SEAL.] JOHN REYNOLDS.

By the Governor.

A. P. FIELD, *Secretary of State.*

Recorded Dec. 1, 1833.

RIC'D J. HAMILTON, *Rec'r.*

19 STATE OF ILLINOIS, *County of Cook, ss:*

I, William L. Church, clerk of the circuit court, and ex officio recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true copy of a certain instrument filed in my office, on the first day of Dec'r, A. D. 1833, and recorded in book No. A of deeds, on page 275.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at Chicago, this 21st day of March, A. D. 1866.

[SEAL.] WM. L. CHURCH,

Clerk of the Circuit Court and ex officio Recorder of Cook County.

[5.ct. U. S. rev. stamp.]

The foregoing is the statement of facts submitted on behalf of the pl'ff.

20 8. It was further agreed that said Alexander Wolcott left at his decease a will, dated Oct. 15th, 1830, which was admitted to probate in the proper office, April 27th, 1831, which will, with the certificate of probate, was in the words and figures following:

STATE OF ILLINOIS, *County of Cook, ss:*

Be it remembered, that on this day, to wit, on the 27th day of April, A. D. 1831, before the probate court of said county, present thereat Hon. Richard J. Hamilton, judge, the following among other proceedings were, by and before said court, had and entered of record, to wit:

CHICAGO, COOK COUNTY, ILLINOIS, *April 27th*, 1831.

At a special term of the court of probate in and for the county of Cook and State of Illinois, holden in Chicago on the 27th of April, 1831, present Richard J. Hamilton, judge, Eleanor M. Wolcott came into court and presented the last will and testament of Alexander Wolcott, dec'd, for probate thereof, which said last will and testament is in the following words and figures, viz:

21 "I, Alexander M. Wolcott, of Chicago, Peoria county, and

State of Illinois, being weak in body, but of sound and perfect mind and memory, (blessed be God for the same,) do make and publish this my last will and testament, in manner and form following:

First. I give and bequeath to my beloved wife, Eleanor M. Wolcott, and my daughter, Mary Ann Wolcott, all my personal estate, goods and chattels, of what kind and nature soever, equally to be divided between them. I further give and devise to my said wife, Eleanor M. Wolcott, and my said daughter Mary Ann Wolcott, to be equally divided between them, all my freehold estate whatsoever, to hold to them, the said Eleanor M. Wolcott and Mary Ann Wolcott, their heirs and assigns forever.

I hereby appoint my beloved wife, E. M. Wolcott, sole executrix of this my last will and testament, hereby revoking all my former wills by me made.

In witness whereof I have hereunto set my hand and seal, this eighteenth day of October, in the year eighteen hundred and thirty.

[SEAL.] ALEX. WOLCOTT.

Signed, sealed, published, and declared by the above-
22 named Alex. Wolcott, to be his last will and testament, in presence of us, who have hereunto subscribed our names as witnesses in presence of the testator.

MARG'T HELEN.
DAVID HUNTER.
MARIA HUNTER.

Also appeared before me at the same time in open court, Margaret Helen, David Hunter, and Maria Hunter, three credible witnesses, of the said county of Cook and State of Illinois, and took and subscribed the following oath, to wit:

STATE OF ILLINOIS, *Cook County, J. N.:*

This day personally appeared before me, Richard J. Hamilton, judge of probate in and for said county, in open court, the above-named Margaret Helen, David Hunter, and Maria Hunter, three credible witnesses, who being by me duly sworn, on their oaths depose and say, that they were present and saw the above-named
Alexander Wolcott sign the above last will and testament in
23 their presence; that they believe and still believe that the said Alexander Wolcott was of sound mind and memory at the time of signing the same, and that they attested the signing of the said last will and testament in the presence and at the request of the said Alexander Wolcott, and in presence of each other.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, this 27th day of April, A. D. 1831.

RICHARD J. HAMILTON,
Judge of Probate C. C.

STATE OF ILLINOIS, *County of Cook, ss:*

I, Edward S. Solomon, clerk of the county of Cook county, in the State of Illinois, do hereby certify that the foregoing is a true and

correct copy of the last will and testament of Alexander Wolcott, deceased; also the record and proceedings had by and before the probate court of said county admitting the same to probate, as appears from the records of my office.

In witness whereof I have hereunto set my hand and af-
24 fixed the seal of said county court, at my office in the city of Chicago, in said county, this 19th day of October, A. D. 1866.

[SEAL.] EDWARD S. SOLOMON, *Clerk.*

[5-cent rev. U. S. stamp.]

9. That said Ellen M. Wolcott made, executed, and delivered to me, David Hunter, a deed, on the 13th day of May, A. D. 1833, which is in the words and figures following:

Ellen M. Wolcott to David Hunter.

This indenture, made the thirteenth day of May, in the year of our Lord one thousand eight hundred and thirty-three, between Ellen M. Wolcott, of Detroit, in the county of Wayne and Territory of Michigan, of the first part, and David Hunter, of the United States dragoons, of the second part, witnesseth that the said party of first part, for and in consideration of the sum of six thousand dollars to
25 her in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, has granted, bargained, sold, remised, released, aliened, and confirmed, and by these presents does grant, bargain, sell, remise, release, alien, and confirm unto the said party of the second part, and to his heirs and assigns forever, all her right, title, claim, and interest, both at law and in equity, which she has by will, indenture, or otherwise, by, from, or through her deceased father, John Kinzie, or her deceased husband, Alexander Wolcott, of, on, and to all the real estate of which they, or either of them, died seized or possessed, lying and situate in the town of Chicago, Cook county, and State of Illinois, as the said town was first laid out by the canal commissioners of the State of Illinois; also the right, title, and interest which she has in law or equity in and to a tract of land containing eighty acres, adjoining the said town, derived as aforesaid, or otherwise.

Also all the right, title, and interest at law or in equity in and to all town lots and water lots situate and being in Kinzie's addition (so called) to the town of Chicago, and which she derived by deed from Robert A. Kinzie or otherwise, the same being numbered ac-
26 cording to the recorded plat thereof as follows, viz: in block No. 2, lots No. 4, 6, and 13; in block No. 3, lots 1 and 2; in block No. 4, lots 2 and 11; in block No. 5, lots 9; in block No. 6, lot No. 2; in block No. 10, lots 1, 2, 3, 10, 11, and 12; in block No. 12, lots 5 and 8; in block No. 14, lots 1 and 2; in block No. 15, lots 3 and 10; in block No. 16, lots 5, 6, 7, and 8; in block No. 17, lots 5 and 8; also water lots No. 8, 13, 17, 22, 26, and 31; also blocks No. 7, 26, 28, 30, 31, 34, 36, 50, 52, and 54.

The grantor intending by these presents to convey all the real estate of which she is seized and possessed lying and being and situate in the county of Cook and State of Illinois, together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining, and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, claim, or demand whatsoever, of the said party of the first part, either in law or equity, of in and to the above bargained premises with the said hereditaments and appurtenances, to have and to hold the said premises as above described, with the appurtenances unto the said party of the second part, and to his heirs,
and assigns forever; and the said party of the first part, for
27 herself, her heirs, executors, and administrators, doth covenant, grant, bargain, and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivering of these presents, she is well seized of the premises above conveyed as of good, sure, perfect, absolute, and indefeasible estate of inheritance in the law in fee simple, and the above bargained premises in the quiet and peaceable possession of the said party of the second part, his heirs and assigns, against all and every person or persons lafully claiming *claiming* or to claim the whole or any part thereof, she will forever warrant and defend. In witness whereof the said party of the first part hath hereunto set her hand and seal the day and year first above written.

[SEAL.] ELLEN M. WOLCOTT.

Sealed and delivered in the presence of—
A. S. PORTER.
CHAS. W. WHIPPLE.

MICHIGAN TERRITORY, *Wayne County, ss:*

On this thirteenth day of May, one thousand eight hundred and fifty-three, personally appeared before me Ellen M. Wolcott, to me
known as the person described in the foregoing deed, also duly
28 acknowledged, she executed the same for the uses and purposes therein mentioned.

Given under my hand and notarial seal the day and year aforesaid.

[L. S.] A. S. PORTER, *Notary Public.*

No. 49,387. Filed for record Mar. 29th, 1854, in book No. 77 of deeds, at page 149.

Book A, p. 381, recorded Feb. 28th, 1834:

MICHIGAN TERRITORY, *Wayne County, ss:*

On the thirteenth day of May, one thousand eight hundred and thirty-three, personally appeared before me Ellen M. Wolcott, to me known as the person described in the foregoing deed, who duly ac-

knowledged she executed the same for the uses and purposes therein mentioned.

Given under my hand and notarial seal the day and year aforesaid.

[L. S.] A. S. PORTER, *Notary Public.*

Recorded February 28th, 1834.

RICH'D J. HAMILTON,
Recorder C. C.

29 STATE OF ILLINOIS, *County of Cook, ss:*

I, William L. Church, clerk of the circuit court, and ex officio recorder in and for said county, in the State aforesaid, do hereby certify that the annexed is a true copy of a certain instrument filed in my office, on the 29th day of March, A. D. 1854, and recorded in book No. 77 of deeds, on page 149.

In testimony whereof I have hereunto set my hand and affixed the seal of our said court, at Chicago, this sixth day of October, A. D. 1866.

[SEAL.] WM. L. CHURCH,
Clerk of the Circuit Court and ex officio Recorder of Cook County.

[5-cents U. S. rev. stamp.]

Which deed was filed for record in the proper office, Feb. 28th, 1834, with the following certificate of acknowledgment upon it.

Book A, p. 381, recorded Feb. 28, 1834:

MICHIGAN TERRITORY, *Wayne County, ss:*

On the thirteenth day of May, one thousand eight hundred
30 and thirty-three, personally appeared before me Ellen M. Wolcott, to me known as the person described in the foregoing deed, who duly acknowledged she executed the same for the uses and purposes therein mentioned.

Given under my hand and notarial seal, the day and year aforesaid.

A. S. PORTER, *Notary Public.*

Recorded February 28th, 1834.

RICH'D J. HAMILTON,
Recorder C. C.

Said deed was again filed for record in the same office May [March] 29th, 1854 with the following certificate or acknowledgment upon it.

MICHIGAN TERRITORY, *Wayne County, ss:*

On this thirteenth day of May, one thousand eight hundred and fifty-three, personally appeared before me Ellen M. Wolcott, to me known as the person described in the foregoing deed; also duly ac-

knowledged she executed the same for the uses and purposes therein mentioned.

Given under my hand and notarial seal the day and year
31 aforesaid.

[SEAL.] A. S. PORTER, *Notary Public.*

No. 49,387. Filed for record Mar. 29th, 1854, in book No. 77 of deeds, at page 149.

Which last certificate is supposed to be an emendation by the officer who took the acknowledgment of the first certificate made at or about the time of the second recording of the deed.

The two instruments last above referred to were offered in evidence and read by the defendant.

10. That the value of the property in question is more than two thousand dollars.

11. The plaintiff offered in evidence a document purporting to be a patent or copy of a patent or record by the governor of the State of Virginia to Alexander Wolcott, to which defendant then and there objected, on the ground that it was a copy and not properly certified or
32 authenticated, which was received by the court subject to such objections.

But the defendants do not admit or agree that said Alexander Wolcott named in said patent is the same person who was the purchaser from the State of Illinois of the lands in question in this suit, nor that said purchaser had any interest in the lands described in the patent offered by the plaintiff at the time of his death.

Said document and certificate was in words and figures following, to wit:

James Monroe, esquire, governor of the Commonwealth of Virginia, to all to whom these presents shall come, greeting:

Know ye, that by virtue of three land office treasury warrants, to wit: 100,000 acres by No. 1,604; 100,000 acres by No. 1,605, both issued the 25th of September, and 150,000 acres, part of number 1,641, issued the 29th day of October, all in the year 1795; there is granted by the said Commonwealth unto Alexander Wolcott a certain tract or parcel of land containing three hundred and fifty thousand acres, by survey bearing date the seventeenth day of December, 1795, lying and being in the county of Russell, and bounded as followeth, to wit: beginning on the east bank of Great Sandy river at the junction of Russell's and the Louisa branches, which form the same, at a sycamore tree marked as a corner, and running thence N. 13° E. 7,480 poles to an elm and a birch marked as a corner
33 standing on the southwest bank of the east branch of Sandy river which separates Russell from Wythe and Kanawha counties, 49 poles below the mouth of a creek that empties therein on the southwest side, called Comforts creek; thence down the said east branch of Sandy river, binding thereon on the southwest side according to its several courses and meanders, 18,940 poles, to the mouth of said branch, where it empties into Great Sandy river;

thence up Great Sandy river, binding thereon on the east side according to its several courses and meanders, 26,470 poles to the beginning; but it is always to be understood that the survey upon which this grant is founded includes three hundred thousand acres of land located for James Swan, of the State of Massachusetts, and decreed to him, the said James Swan, for the use and benefit of himself and others, by the honorable the high court of chancery, on the sixth day of October, one thousand seven hundred and ninety-seven, which said decree was established and confirmed by a decree of the court of appeals made in the city of Richmond, on the third day of May, in the present year, also including one hundred and ten thousand acres of prior claims by the Reverend James Madison, John Preston, and others, making in the whole four hundred and ten thousand acres, (exclusive of the above quantity of 350,000
34 acres,) all of which having a preference by law to the warrants and rights upon which this grant is founded, liberty is reserved that the same shall be firm and valid, and may be carried into grant or grants, and this grant shall be no bar in either law or equity to the confirmation of the title or titles to the same as before mentioned and reserved with its appurtenances, to have and to hold the said tract or parcel of land with its appurtenances to the said Alexander Wolcott (except as before excepted) and his heirs forever.

In witness whereof the said James Monroe, esquire, governor of the Commonwealth of Virginia, hath hereunto set his hand and caused the lesser seal of the said Commonwealth to be affixed at Richmond, on the eleventh day of June, in the year of our Lord one thousand eight hundred, and of the Commonwealth the twenty-fourth.

JAMES MONROE.

STATE OF VIRGINIA, *to wit:*

I, William G. Pendleton, register of the land office of the State aforesaid, do hereby certify the foregoing to be a true and examined copy of a grant to Alexander Wolcott from the record thereof now being and remaining in my custody by virtue of my office aforesaid.

Given under my hand and seal of office, at the capitol in
35 the city of Richmond, on the 19th day of February, in the year of our Lord one thousand eight hundred and twenty-two.

[SEAL.] WM. G. PENDLETON, *Reg. L. Off.*

Upon the foregoing statement of facts the court held that the law was with the defendant, being of the opinion that the alleged patent from the governor of Virginia was immaterial, and therefore rejected it as evidence, and found the issue and rendered judgment accordingly; to which decision and finding of the court the plaintiff then and there excepted.

E. S. HOLBROOK, *for Plaintiff.*
MATHER & TAFT, *for Defendant.*

Exceptions allowed.

[SEAL.] THOMAS DRUMMOND.

Indorsed: Filed Nov. 26, 1866.

WM. H. BRADLEY, *Cl'k.*

36 And on this day, to wit, the 30th day of November, A. D. 1866, came said plaintiff, Kinzie Bates, by his attorneys, and filed in said clerk's office his appeal bond in said entitled cause; which said appeal bond is in the words and figures following, to wit:

Circuit court of the United States for the eighth circuit and northern district of Illinois.

KINZIE BATES
vs. } In error.
WILLIAM H. BROWN.

Know all men by these presents, that we, Milton O. Higgins and E. S. Holbrook, are held and firmly bound unto the above-named William H. Brown in the sum of five hundred dollars, to be paid to the said William H. Brown, his executors or administrators, to which payment, well and truly to be made, we bind ourselves, and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 30th day of November,
37 in the year of our Lord one thousand eight hundred and sixty-six.

Whereas the above-named Kinzie Bates hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled suit by the circuit court of the United States for the eighth circuit and northern district of Illinois.

Now, therefore, the condition of this obligation is such that if the above-named Kinzie Bates shall prosecute his said writ of error to effect and answer all damages and costs if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

[SEAL.] MILTON O. HIGGINS.
[SEAL.] E. S. HOLBROOK.

Sealed and delivered in presence of—

Approved. THOMAS DRUMMOND.

Indorsed: Filed Nov. 30th, 1866.

WM. H. BRADLEY, *Clk.*

38 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States within and for said northern district of Illinois, do hereby certify the foregoing transcript from pages one to thirty-seven inclusive to be a true and correct copy from record of all the proceedings which have been had in said court in said cause of Kinzie Bates *vs.* William H. Brown as the original of the same now remain in my custody, and that the writ of error and citation sued out therein by the plaintiff in error are hereto appended to this transcript.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office, in Chicago, in said northern district, this twenty-second day of December, A. D. 1866.

[SEAL.] WM. H. BRADLEY, *Clerk.*

[5-ct. rev. stamp.]

39 UNITED STATES OF AMERICA, *ss:*

The United States of America to the honorable judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, in a suit in ejectment between Kinzie Bates, a citizen of the State of Michigan, plaintiff, and William H. Brown, a citizen of the State of Illinois, defendant, a manifest error hath happened to the great damage of the said Kinzie Bates, as by his complaint appears: We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the first Monday of December next, in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid being inspected, the Supreme
40 Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the honorable Salmon P. Chase, Chief Justice of the said Supreme Court, at Chicago, the 27th day of November, in the year of our Lord one thousand eight hundred and sixty-six, and of the independence of the United States the 91st year.

[SEAL.] WM. H. BRADLEY, *Cl'k.*

41 The United States of America to William H. Brown, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Kinzie Bates, a citizen of the State of Michigan, is plaintiff, and you, William H. Brown, a citizen of the State of Illinois, are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Thomas Drummond, of the circuit court of the United States for the northern district of Illinois, this 1st day of December, A. D. 1866.

THOMAS DRUMMOND.

The above citation was shown to us at our office in Chicago, this 3d day of December, A. D. 1866.

MATHER & TAFT,
Att'ys for Def't.

O

IN THE

SUPREME COUR

OF THE UNITED STATES.

December Term, A. D. 1866.

KINZIE BATES,
vs.
WILLIAM H. BROWN.

ARGUMENT ON BEHALF OF KINZIE BATES, PLAINTIFF IN ERROR.

CHICAGO:
J. Munson & Wilson, Printers, 66 & 68 La Salle Street.

IN THE

SUPREME COURT

OF THE UNITED STATES.

December Term, A. D. 1866.

KINZIE BATES,
vs.
WILLIAM H. BROWN.

ERROR TO THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS. SUIT IN EJECTMENT.

ARGUMENT ON BEHALF OF KINZIE BATES, PLAINTIFF IN ERROR.

May it please your Honors:

The facts of this case may be briefly stated thus:

Alexander Wolcott, on the 29th day of September, A. D. 1830, purchased of the State of Illinois the property described in the declaration, (being canal land,) paid the consideration, and received the usual certificate therefor.

On October 30th, A. D. 1830, he deceased, leaving a wife, Eleanor M. Wolcott, and a daughter, Mary Ann Wolcott, an only child, about five years of age.

He left a will which was duly probated, April, A. D. 1831, by which he devised all his freehold estate to his said wife and daughter, to be equally divided between them.

Said daughter deceased intestate, Jan. 16th, A. D. 1832, leaving her mother the nearest presumptive heir to her property.

Said Eleanor M. Wolcott married George C. Bates May 26th, A. D. 1836, and the plaintiff in error is their only child, who was born April 13th, A. D. 1838. The mother of plaintiff deceased Aug. 1, 1860. The father is still living.

On the 5th day of July, A. D. 1833, a patent for the land, rehearsing the decease of Alexander Wolcott, was issued to his "legal representatives."

On the 13th day of May, A. D. 1833, Mrs. Wolcott executed a deed to David Hunter. The defendant claims that she thereby conveyed her title to this property to said Hunter. The plaintiff denies this, and makes reference to the deed on a question of description.

For the purpose of showing that Wolcott, at the time of the execution of his will, had freehold estate in fact, the plaintiff offered in evidence a patent, or a copy of a patent, by the State of Virginia, under the seal of State, to Alexander Wolcott, of a large quantity of lands in Virginia, dated about A. D. 1797.

I have not the record before me, and therefore no specific reference thereto can be made.

These are the facts. The plaintiff brings suit to recover as heir of his sister of the half blood, one-third part undivided, or, one-sixth part undivided of the whole estate; one-third if his half-sister, Mary Ann, took the whole estate as heir of her father; one-sixth if she took one-half only as his devisee—the mother having taken the balance of the estate, and the father, Geo. C. Bates, being entitled as tenant by the courtesy to the possession thereof. The claim is based on the common law doctrine of inheritances taken in

connection with the statute of the State of Illinois, which places the half blood on an equality with the whole blood, and upon that feature of the common law that provides for the shifting of the estate inherited after it has vested, by the birth of a nearer heir. A decision (*pro forma*, as the court took occasion to say,) was made against this claim. The case is brought here for review, and this is the principal question presented. And I maintain that, although the mother was the immediate presumptive heir of Mary Ann, at her decease, and as such was vested of her estate; yet, on the birth of the plaintiff, a brother of the half blood, a ***nearer heir*** as to a part of her estate, or rather (under the statute,) one equally near, a co-heir with the mother in proportion of one to two of the estate which was of the daughter and half sister, one-third of that estate, so inherited, divested from her, or whoever held it, and vested in the plaintiff in error. -as heir of his half-sister, to the same extent as if he had been living at the date of her death, except as to rents and profits accruing prior to his birth, to which he is not entitled.

I.

That such was the rule of descents at common law, will probably pass uncontroverted. It is recognized by all the authorities on the subject both English and American.

2 *Bl. Com*, 208 (*margin*) *and notes.*

I transcribe the statement of Chitty, in the note, as to the operation of the rule: "As if an estate is given to an only child who dies, it may descend to an aunt, who may be stripped of it by an after born uncle, on whom a subsequent sister of the deceased may enter, and who will again be deprived of the estate by the birth of a brother."

The same doctrine is set forth in

3 *Cruise Dig. p.* 375 (*margin*).
1 *Lomax Dig.* 587 (*top*), *sec.* 15.
Tomlin's Law Dic. title Descent.
4 *Kent*, 389, 410.
3 *Com. Dig. Descent, C.* 2.
Co. Littleton, 11 *b.*
Bassett vs. Bassett, 3 *Atkyns* 230.
Goodtitle vs. Newman, 3 *Wilson*, 516.

Placing the brother of the half blood in the position of the brother of the whole blood, which has been done by the statute of this State, from its earliest existence to the present time, (thus adopting him into the family of heirs), the full operation of the principle can be seen as applicable to this case.

II.

But although an admitted rule of the common law, is it a law of this State, and applicable to the case at bar?

The State adopted the common law of England and English statutes passed in aid thereof, with some specified exceptions, as early as 1819; and it might be urged, if there were any occasion for urging, that the State and territory were under the same laws before that. The first emigrants from the mother country brought the common law with them, and the whole people, in colony, state, and territory, have ever lived under it. The Congress in the ordinance of 1787, recognized the existence of the common law in the Northwestern territory, in establishing a court therein with common

law jurisdiction, without other definition or limitation. True enough, it may be said that not all the common law was so imported and so adopted, but only so much thereof as was "of a general nature not local to that kingdom," (Great Britain) in the lang first act, (*See Gale's Statute of Illinois, p.* 440,) or so far as the same "was applicable and of a general nature," in the superadded words of the second act (*See Revised Statutes of* 1845, *p.* 337,) yet it was the great body of law; and the exceptions were easily discovered and enumerated; so much so as to be left to the discernment and discretion of the judges, with but very little limitation by present legislation.

And that limitation, was it not made express and definite as to descents? The features of the common law and statutes in aid thereof, objectionable to the colonists and an American people, were chiefly as to the origin of government, as to the equal rights of all, and as to the descent of property, the rights of primogeniture, the inequalities involved in it, the exclusion of the parents and the half-blood relatives from inheritance, &c.; and these were expressly provided for in the Ordinance of 1787. "*Expressio unius exclusio alterius.*" These changes being effected, all else remained as at common law. So far the common law was modified for this common law court then established by Congress over the Northwestern territory; and no farther. The principle of equality was established in the distribution of decedent's effects. Nothing is said of the shifting character of these inheritances. Nothing is said of the subsequent birth of a nearer heir, or one equally near. No restriction is made that the heir shall be living at the time of the decease of the ancestor; and a common law court is established to administer the common law, with nothing more of statute modification. That is to say, in every other respect than as expressly changed, the rules of the common law remained, or were extended and enforced. At this point of time the nearer heir, subsequently born, devested an estate from him who had taken it as the nearest heir at the ancestor's death, and took it himself. And such became the law of

The same doctrine is set forth in

3 *Cruise Dig. p.* 375 (*margin*).
1 *Lomax Dig.* 587 (*top*), *sec.* 15.
Tomlin's Law Dic. title Descent.
4 *Kent*, 389, 410.
3 *Com. Dig. Descent, C.* 2.
Co. Littleton, 11 *b.*
Bassett vs. Bassett, 3 *Atkyns* 230.
Goodtitle vs. Newman, 3 *Wilson*, 516.

Placing the brother of the half blood in the position of the brother of the whole blood, which has been done by the statute of this State, from its earliest existence to the present time, (thus adopting him into the family of heirs), the full operation of the principle can be seen as applicable to this case.

II.

But although an admitted rule of the common law, is it a law of this State, and applicable to the case at bar?

The State adopted the common law of England and English statutes passed in aid thereof, with some specified exceptions, as early as 1819; and it might be urged, if there were any occasion for urging, that the State and territory were under the same laws before that. The first emigrants from the mother country brought the common law with them, and the whole people, in colony, state, and territory, have ever lived under it. The Congress in the ordinance of 1787, recognized the existence of the common law in the Northwestern territory, in establishing a court therein with common

law jurisdiction, without other definition or limitation. True enough, it may be said that not all the common law was so imported and so adopted, but only so much thereof as was "of a general nature and not local to that kingdom," (Great Britain) In the language of the first act, (*See Gale's Statute of Illinois, p.* 440,) or so far as the same "was applicable and of a general nature," in the superadded words of the second act (*See Revised Statutes of* 1845, *p.* 337,) yet it was the great body of law; and the exceptions were easily discovered and enumerated; so much so as to be left to the discernment and discretion of the judges, with but very little limitation by present legislation.

And that limitation, was it not made express and definite as to descents? The features of the common law and statutes in aid thereof, objectionable to the colonists and an American people, were chiefly as to the origin of government, as to the equal rights of all, and as to the descent of property, the rights of primogeniture, the inequalities involved in it, the exclusion of the parents and the half-blood relatives from inheritance, &c.; and these were expressly provided for in the Ordinance of 1787. "*Expressio unius exclusio alterius.*" These changes being effected, all else remained as at common law. So far the common law was modified for this common law court then established by Congress over the Northwestern territory; and no farther. The principle of equality was established in the distribution of decedent's effects. Nothing is said of the shifting character of these inheritances. Nothing is said of the subsequent birth of a nearer heir, or one equally near. No restriction is made that the heir shall be living at the time of the decease of the ancestor; and a common law court is established to administer the common law, with nothing more of statute modification. That is to say, in every other respect than as expressly changed, the rules of the common law remained, or were extended and enforced. At this point of time the nearer heir, subsequently born, devested an estate from him who had taken it as the nearest heir at the ancestor's death, and took it himself. And such became the law of

descents of the territory. In 1819 the State, immediately after its organization, formally adopted the common law and acts of the British Parliament in aid thereof, which were of a general nature and not local to England, as rules of decision until repealed.

Now, can it be said that this rule of descents pertainining to the shifting of inheritances was not adopted? or rather, was not continued? and for what reason? Because it is *not* "of a general nature" and "*is* local to that kingdom"?

The answer to these questions covers the objections which the defendants, according to my present understanding, raises against my proposition, to wit: that this rule, being of feudal origin, under a government radically different from ours, involving titles in uncertainty, withholding property a long time from the market, &c., was, and is, inapplicable to us, to our government, and people, and business, and hence was not adopted; or if at any time, or in any sense, adopted, that it has been abandoned.

It is to be observed for what it is worth, that the rights of the plaintiff accrued under the act of 1819, before the act of 1845 was passed; and the introduction of the additional words "so far as the same is applicable" into the later act, words restrictive as they are, must not be permitted to shape, or qualify, the former act. But even if it should, and it be held that the former law holds no broader meaning than the latter, (which I do not concede) yet it seems to me, and I maintain, that the doctrine of shifting inheritances is more fraught with equality and justice than the principle they would substitute for it, and, consequently, more consonant with, and applicable to, the condition of things as found and existing among our people, and under our government.

To show this I present a supposed state of facts. A, I will say, in early married life, has two sons. The one of them receives real estate by devise from an uncle, and I suggest that the faulty

habits of the father have induced the action of the uncle in so disposing of his property. The devisee dies, and the estate descends one-third to the father, one third to the mother, and one-third to the brother. In time, and it may be after many years, there are born unto him a son and a daughter. On the principle of equality, and consequent justice, should not they have a part of the property of the deceased brother? And on the principle of expediency merely, should not the law give it? It may be required for education, and a spendthrift father may squander it. They should share equally with their elder living brother also. Now vary the case, and say that the mother first deceases, and the father receives two-thirds of the estate. He marries again, and has children, a son and a daughter. For the same reasons they should have a like part in their half-brother's estate. Now vary the case again, and say that the father first deceases leaving a child *in ventre sa mere*; next the son that has property deceases, and afterwards the posthumous child is born. Does not equality require that the youngest shall have an equal share with the others of the deceased brother's estate? And yet without the rule of shifting inheritances, the youngest born, and the most needy of all, takes nothing.

There is no hardship in the rule, or in its operation. Whoso takes by law is no purchaser. The estate costs nothing, but it is a free gift, under the will which the law makes. What the law gives it may give on condition, and may take away accordingly. Whoso takes by inheritance, or devise, takes an estate defeasible in its nature. There is a power in the administrator to sell the estate of the intestate, now vested in the heirs, for the purpose of paying debts; and that, too, though the heirs may have sold for value. Heirs and devisees may be defeated by a power of sale in executors. A devisee under one will may lose his estate, after many years, by the discovery of a subsequent will; and it would seem that purchasers for value at an executor's sale might lose their estate in the same way.

In this country there are no "heirs apparent" in the sense of the English law. "Heirs apparent are such whose right of inher-

itance is indefeasible, provided they outlive the ancestor, as the eldest son or his issue, who must by the course of the common law, be heir to the father whenever he happens to die. Heirs presumptive are such, who, if the ancestor should die, immediately, would, in the present circumstances of things, be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born." 2 *Bl.* 208. It was the rule of primogeniture alone that could make one heir apparent of the whole estate. The law for the distribution of the estate equally among a family of heirs will not allow of "heirship apparent;" at least, until possibility of issue, on the part of each parent, is extinct, and then not to the whole estate, unless he alone is the nearest heir. Practically, then, with us heirs are simply "heirs presumptive,"—heirs to a defeasible estate, in whole or in part, and that defeasibility existing as well after as before the death of the ancestor, and as long as there are possibilities that can effect the defeasance.

I apprehend that the denial of the doctrine of shifting inheritances cuts deeper than defendant's counsel anticipate; for without this the posthumous child was once left without an inheritance. I do not find a statute provision that a posthumous child shall inherit, until the act of 1829; and although there may have been such an act earlier than this (not now discovered), I feel confident [redacted] such existed under the territorial and earlier State government. At the common law such a child was deemed an heir. Before his birth the nearest heir living took the estate in possession, with rents and profits; but it was divested, on the birth of the child, from that heir, and vested in the nearer heir; but not before his birth. If that rule of descent then, which gave him his inheritance, was not adopted, and there were no statute, such an one would not have obtained an inheritance—an unworthy penalty for that tardiness which was no fault of his;—and the same remark may be made of all those who would be deprived of their proper equal inheritance by the restrictive rules urged by the defence. It requires the shifting of inheritances to make all equal, and to work out justice; and shall it be said that such a rule is *local* to England, and is *not*

general in its nature, and is not consistent with our governmental, financial, and social policies?

The fact that the rule may have been of feudal origin, an incident original or derivative of the feudal tenures, (though I do not admit the fact to be precisely so,) and interwoven with many other rules that are objectionable, and which have been discarded by most of the States, should not be made use of to condemn it, while it has merits in itself, or is harmless as a part of the great whole—for, by such proceedure, what, from our political standpoint, would be left to us of the whole common law; or of ecclesiastical or civil law? The beautiful fabric of the common law has been worked up to its present state of perfection, by preserving the good and rejecting the bad only. From a system full of errors and imperfections (or what would be such in this age), it has come to have but few. The law of primogeniture, for reasons peculiar to that government, has been sustained. That aside, and the Government, the common law, and the statute, have aimed at equality; and it was the sense of equality and right, and the effort to attain them that gave birth to this rule.

But I go further, and say, that it does not devolve upon me to prove the affirmative of this proposition. The great body of the common law was adopted with exceptions. The exceptions should be proved. The Congress of 1787, in establishing the common law, with express modifications, may well be deemed to have made all the modifications it desired. The State legislature, in making affirmatively, express exceptions, may be deemed to have made all the desired exceptions, upon salient points at least. All the rest, as a great body of law, as ready made and fit for use, should be deemed to have been adopted. If it be said that any other part of it is not adopted, a plain and palpable reason should be given, and sufficient affirmatively for its rejection. A rule may have been without good reason in its origin, or even against reason; if, nevertheless, it became an established rule, like, for instance, the days of grace on

commercial paper, yet having been once adopted, however negative. or simple, or unreasonable at the first, it is now become a part of the law, deeply ingrained, a necessary part, at least, from its connection with other rules. It is sufficient if it is *as* fit for this country as for England. Yea, more, the plain and palpable rule of the common law must be deemed to be adopted, being so interwoven with the whole great body of the system that it cannot be abandoned without an infringement of other rules;—unless it is so plainly and palpably, in itself, and in all its bearings, at variance with our condition and needs, that its enforcement will work more injury than good.

The commercial argument, as it may be called, although it seems to be the backbone of the defence, can be easily disposed of. It cannot be disputed that some property will be kept longer from the market, as until possibility of issue of the whole blood relative, or the half blood becomes extinct, some few titles may be shadowed by such possibility. The property of infants now must be preserved intact, (except by process of law for their benefit,) until they attain their majority, (which may be for a period of twenty-one years,) and it has been deemed highly commendable in courts and citizens sacredly so to preserve it. Why should not the law and the citizen care equally as much for those who may come to their inheritance at a later period? They are equally needy, probably more so. There is land enough besides for speculative and commercial purposes. The vandal spirit that coldly denies the rights of equal distribution to the after born heirs of equal blood with the living, may as well, and will be likely to, encroach on those now protected by infancy, or other incapacity, and demand that their property shall not be *so long* kept from the vortex of speculation.

But this matter of commercial expediency, or policy, is one that does not highly commend itself to the consideration of courts. In itself it is one not of the noblest character, and it is a question solely for the law making power. The Legislature may change the law when it deems it expedient to do so; until then the rule is "*ita*

lex scripta." The Legislature has adopted the law of another country, with its full meaning as there interpreted. It has made the half blood the co-heir with the whole blood, and the consequences rest with it alone, and not with the courts that are called upon simply to interpret the law.

I think I will here, while examining objections raised by defendant, reply to another position which I am advised he will take; that is, that this rule, although once adopted, has been repealed; as I suppose, either expressly by the statute of wills of 1829, (*Gale's Statute, p.* 720, *Sec.* 140,) which repeals all laws inconsistent with that act, or impliedly by the full legislation presented by that act, or anterior acts, upon the same subject matter; and it is claimed that now, as to descents, there is no common law rule, but only a statute rule.

Repeal by implication is a doctrine not favored in law; and if indulged in now, let me ask when the repeal took effect? The ordinance of 1787 established a law of descents and wills; and the State Legislature has many times made laws on the same subject matter. When shall it be said that they perfected the law so as to require no aid from the common law, and so shall be deemed to have abandoned it? shall one say it was by the act of 1829, under which plaintiffs' rights accrued? and yet the next Legislature found further work to do, and almost every succeeding Legislature, also, until 1845, when there was another revision, somewhat more full than before, and yet the subject is not at rest.

A repeal by implication, as I understand it, is where a Legislature, by a new act, has reviewed the whole subject matter; and in so thorough a manner as that, if anything of former laws on the subject matter is omitted, that it must be presumed to have been so omitted by design; and hence a repeal of that which is omitted is implied in law. As to this, I reply that we have no act that ought to be deemed so perfect a review of the whole subject as to have such an effect. It would be dangerous so to consider it. It would

be impolitic ever to sever ourselves from the common law,—a perfected body of rules built up and compacted by the wisdom of centuries,—and surrender ourselves to the hasty legislation of modern legislatures;—certainly most unwise to imply a repeal in what may be simply an oversight. I find an item of a practical character on p. 723 of Gale's Statute. The Legislature of 1833 enacts an amendment to this same act of wills and testaments of 1829, supposed to be so perfect in its extent and outlines as to effect a repeal of all that is omitted of anterior laws, for the purpose of remedying the defects of that statute as well as the common law. The preamble reads thus: "Whereas by the act entitled 'An act relative to wills and testaments, executors, administrators, and the settlement of estates,' no power is given a parent to appoint, by will and testament, a guardian for his child, or children; and whereas, also, the common law recognizes no such power."

Sec. 1. Be it enacted," &c., granting such power. The logic of this is very apparent: 1st. The act of 1829 is regarded as imperfect. 2d. In the absence of statute law, the common law is recognized as in force. Such is the opinion of the law making power.

It is not likely that any one will insist that a partial review of the subject matter, a review of one branch of the general subject matter, will imply a repeal in any sense, or to any extent, except to the extent that the law is expressly changed; for how can you say that the Legislature intended to touch other points than those it did touch; who shall draw, and how, and where, will you draw the circle, and say that within this the Legislature have made a perfect law. Such a proposition is sufficiently refuted by its simple statement; for then we have had no common law as to descents since the ordinance of 1787.

I am advised, also, that defendant claims some advantage on the argument for repeal from Sec. 50 of the act of wills, of 1829, as to the rights of posthumous children, and in this wise, that the

statute, in providing affirmatively to this extent for after born heirs, impliedly negatives any provision for other after born heirs, embracing the principle contended for by plaintiff;—for it is said unless it has this meaning it has no force, being only a reiteration of the common law. While I recognize the rule that some meaning should be given to a statute, if possible, yet it is not imperative to consider that a statute speaks a new law, for many a statute provision, and particularly a single section, is but the reiteration of the common law, and effected often through the ignorance, or thoughtlessness of the legislator; and a court would not seek to infer anything from it, nor call the law, so spoken, a new law, or any the less the common law; or the right given a common law right, than before. Such are a large portion of the Statutes of this State.

But this law in fact *is* a new law. It contains a new, original provision. At the common law the posthumous child was not deemed an heir until born. The estate, until his birth, descended to the nearest heir, with right of possession and pernancy of rents and profits. (See references already made as to heirship.) This statute gives to the child immediately, the title and the back rents and profits, from the date of the death of the ancestor. It has reference to only one class of after born heirs, the child or children of the intestate, born after his decease. There are many other classes, as I have shown by my references and my supposed instances, and many others may be suggested. Now, to say that the rights of all these are lost by this statute, which did confer a new right to one class, and, for aught that appears, whose object was simply to confer such new right, and that, too, by the mere negative force of implication, is to give to it an unwarranted and unauthorized construction.

As to the other point, an express repeal, "*laws conflicting*" only are repealed. The point on which the plaintiff in error relies is not one in conflict with the statue of 1829. It is an omission. The statute, in casting the descent upon the brother, does not define whether it shall be simply the brother living at the time of the descent cast, or whether the word, as at common law, shall have

such a signification as that it shall include also an afterborn brother. The statute, as to a definition, is silent. It is "*casus omissus*" in legislation.

The Supreme Court of this State has often passed upon these questions of common law rights and repeal by implication. It, as well as the legislature, has ever clung to the common law. It has pronounced dower to be a matter of common law right, and yet dower was definitely given by the ordinance, and has been often repeated since. Even in criminal matters, although there has been a very perfect law, and, as it were, an attempt to go over the whole field, and of many years standing, offences at common law are still recognized and prosecuted. The legislature as late as 1845, (*Rev. Stat.* 186,) provides, that trials and rules of evidence, except when altered, shall be as at common law. The rights of tenants by the courtesy exist as at common law, and are only incidentally recognized by statutes upon other subjects.

The case of *Clinefelter vs. Ayres*, 16 *Ill. Rep. p.* 329, is very *apropos* upon this question. It is a decision upon the same statute of wills of 1829, and upon this very point of implied repeal. The plaintiff in that suit claimed that by section 89, all the executors appointed with power of sale must join in the conveyance made under the power. But the defendant insisted that the statute 21 Henry VIII clothed the others, in case some refused, with full power of sale. The plaintiff replied that this statute of 1829 was a full review of the whole subject matter, and hence impliedly a repeal of such of the former laws as were omitted.

He also insisted that there was an express repeal, as the two statutes conflicted. But the court held against both these propositions. After stating that the statute 21 of Henry VIII, and the statute of wills 32 and 34, Henry VIII were adopted by our statute, the court went on to say: "The Legislature subsequently passed a general act, very comprehensive in its provisions and minute in its detail, embracing the subject of testaments, intestacies, and admin-

istrations," &c. (Here they quote the act giving power, and then go on to say:) "It is contended that this act is a general one, intended and embracing the whole subject matter of the common law and English statutes, and must therefore, by necessary implication, repeal, not only all acts contrary and repugnant to, and inconsistent with it, but all others on the same subject, because of the manifest intent shown to make full regulations of all things relative to these subjects. While I admit the doctrine of repeal by implication, for repugnancy and inconsistency, I cannot admit the other branch of it by implication, as applicable to these subjects, full, complete and perfect as these new regulations may be; and for the satisfactory reason that they do not contain sufficient to constitute a perfect system of laws on these subjects. But we are compelled constantly to resort to the principles of the common and ecclesiastical law, to administer the principles of the statute.

There is no repugnancy but simply an omission in the act of wills, of the principles of the statute 21 *Henry VIII, chap.* 4.

"It is a salutary, remedial provision, which we can see no reason for, nor should we favor a repeal of it by implication, drawn from subjects in which there is no analogy."

This is a decision of our State court upon our State laws, and of course it will be followed. It is a case upon *all fours* with this upon the same kind of a question, on the same subject matter, upon the same statute, upon the same points; and it would seem must place this part of the defence "*hors du combat.*"

(The Judge, in writing this opinion, evidently had the statutes of 1845 before him; but there is no difference in the two except in the numbering of the sections. The case arose under a will made and probated in 1841.)

The failure on the part of the Legislature to speak of the shifting of inheritances, the failure to define the term brother, I have called

a "*casus omissus*" in legislation. This is left, then, as at common law, and is to be determined by the common law.

I cite as authority much in point, *Barnitz's Lessee vs. Robert Casey*, 7 *Cranch*, 456, 468. The Legislature of Maryland passed, in 1786, a statute of descents, intending, doubtless, to form a perfect system; for they say that the old law should be abolished; and the specifications are drawn out at great length; and yet a descent from brother to brother is not provided for. It is held to be a "*casus omissus*" and to be governed by the common law. As a part of this case, it appears that the statute of Maryland limited descents to living heirs. How much more then is the plaintiff in error here entitled to the construction of the common law; *here*, where nothing like a dislike to the common law, either by legislatures or courts, is shadowed forth beyond the express enactments of the statutes.

See also *Berdell vs. Janney et al.*, 4 *Gil. Rep.* 194, 205, "where a word, or a term, which had a well known common law meaning, is used in a statute, such word shall be understood in the construction of the statute, in the same sense as at common law," (*Quoting Mayo vs. Wilson*, 1 *N. H.*, 555). So, also, of technical terms. The term brother at the common law means one that may come into being, as well as one in being, and the Legislature used the term with this meaning. See also,

Tyson et ux. vs. Postlethwaite et al., 13*th Ill.*, 727.
Gardner vs. Collins, 2 *Pet.*, 58.
Levy et al. vs. McCartee, 6 *Pet.*, 108.

This court has lately held that the words "*next of kin*" in the statute of Illinois, have a common law meaning.

McCool vs. Smith, 1 *Black*, (*U. S.*) 459.

I cite these further authorities in support of my principal propositions:

Cutler vs. Cutler, 2 *Hawks*, (*N. C.*) 324.
Caldwell vs. Caldwell, 5 *Iredell*, (*law*) 463.

and authorities quoted.

Dunn vs. Evans, 7 *Ohio R.*, 169.
Drake vs. Rogers, 13*th Ohio St. R.*, 21.

The cases in North Carolina fully sustain the rule as I have stated it. One of them is on all fours with this, even to the extent that the premises had been conveyed before the birth of the claimant, (if such shall be deemed to have been made,) and the laws of the State were like our own.

The cases in Ohio are a little different, as the common law was not in force there, and the statutes were different from ours. The case in 13 Ohio was cited also by defendant, on trial, probably from the mere fact that the final decision was against the claim of an after born heir, without any consideration of the reasons of the decision. But these are both strongly for the plaintiff. The laws of that State (page 30 of the case) provided that estates should descend "in no other manner whatsoever" than the way pointed out; and yet the decision of 7 Ohio was made while such law was in force, and in favor of the subsequently born heir, according to, and by virtue of, the common law rule.

In 1853 an act was passed as to descents, and the term "living," in the description of heirs, was introduced. On that law the case in 13 Ohio State arose. And yet the decision against the claim of the after born heir of the half blood was carried by a bare majority of the court, two of the five judges dissenting.

It is very proper, in reading this case, to distinguish carefully between the Judge writing the opinion, and the court. The Judge seems to exhibit great hostility to the common law rule; and it

seems his statements and reasoning are much affected thereby. The quotation from 12 *Mass. p.* 31, gives an erroneous view. The question before the court was, if the half blood inherited. As to that, the court stated that at common law it could not be made a question, but that it was controlled by their statutes—quoting English statutes as well as their own. The case in 9 *Ind.* is not as he states it. But even if it were, it could not avail for authority here, for he says the decision was made under statutes similar to the statutes of Ohio; and I say, therefore, dissimilar to the statutes of Illinois. In fact it does not appear that a majority of the court was with him upon any of his reasoning, only upon the statute of 1853; for by his reasoning he would overrule the decision of the *7th Ohio*, and this the court would not do. So the court took no part in his argument as to the propriety of the rule of shifting inheritances, or in his commercial argument, or in his suggestion as to the statute provision as to posthumous children.

Alltogether, it is a very strong authority for the plaintiff; for if in a State where the common law was not formally adopted, where there were many decisions that their statutes were a perfect rule, where the statutes provided against descents, except as therein pointed out, and restricted the descent to the living heirs; if even there such a decision is obtained by a *divided* court, it is plain to see what should be done in Illinois, where the rule meets with no such antagonistic statutes, and where it can stand upon the express adoption of the common law.

In Virginia, the statutes restrict the descent to the *living* heirs.

See 1 *Lomax, Dig.* 563 (*top*), *sec.* 13.

The matter of shifting remainders, is analogous to that of shifting inheritances; and similar rules of law obtain as to them.

I present these authorities to show that they are sustained by American courts.

Williamson vs. ——— 5 *Conn.* 100.
2 *Sandf. Ch.* 533.
8 *How. (U. S.)* 495.
Cochrane vs. Van Surley, 2 *Wend.* ——
3 *Pick.* 360.

These authorities seem to me to determine this question of law in favor of the plaintiff in error; and in fact, as a matter of affirmative law, and by the view of statutes changing the common law, thereby admitting what it was before, they all point to one conclusion, without hardly an opposing authority. The first case in Indiana, refered to by the judge in 13 Ohio, on examination proves not to be a case in point. The last case in Indiana, quoted also in 13 Ohio, (not then reported,) I have not seen; but unless that be adverse, there seems not to be a single case adverse to the proposition of the plaintiff in error. If there are decisions that seem on first reading to be against his position, they are dicovered to be based upon something which does not exist here; either that the common law was not adopted, or, being adopted, has been repealed, or upon some new statutes which forbid such construction.

In view of all these, the conclusion is irresistible, that in Illinois, that early adopted the common law, that has not repealed or changed it, in this particular, whose legislature and court of final resort have ever looked to it for rules of decision in all cases not otherwise provided for, this rule, relied on by the plaintiff in error, must be deemed to be the law of the State.

III.

The principal question being decided for the plaintiff in error, other questions will have to be passed upon. In the court below a suggestion was made on behalf of the defendant and against the title of plaintiff as presented, in this way, and to this extent; that although the law might otherwise be for him, yet the patent from the State did not clothe him with the legal title.

I think this objection is not well taken. Alexander Wolcott, on the payment of the money, had an equitable title. This either passed by his will, one-half to his wife and one-half to his daughter, or, notwithstanding his will, the whole descended to his daughter. On her decease, what she held passed to the mother. On this question it matters not whether she conveyed her interest or not. At such a time, the patent, without any new consideration, was given out. I read it that, his death being rehearsed, it runs to his "legal representatives;" these words being words of purchase, and the words "heirs and assigns," being words of limitation. No other reading can effectuate the design, or make a proper legal document of it. The statute which provides that the words "heirs and assigns" need not be used in a deed was passed after this, July 1837 (*See Gales' Statute p.* 157); and so, unless the words "heirs and assigns" are words of limitation, only a life estate was given when the whole purchase money was paid, which is absurd.

The State, not knowing where the equitable title was, and not designing to decide, but only desiring to do justice, threw out the legal estate to gravitate to the equitable estate wherever it might be; to unite with it and form a perfect title, with the same effect, for the present and future, as if it had from the first coursed down the same channel that the equitable title had. The grant is made (as it cannot be made to the purchaser) to all who represent him in law, his "legal representatives," (*nomen collectivum,*) the "heirs and assigns," to hold to the same, their heirs and assigns, (the heirs and assigns of each and every of them,) according to the laws of descent and purchase forever. Probably a blank form was used, and hence the omission of the personal pronoun. I further suggest that this must be the only way to read the patent, because the term "legal representatives" is of wider signification than the term "heirs and assigns," as will be seen by closely comparing them, if used separately; for the heirs and assigns of Alexander Wolcott would not embrace the heirs and assigns of any other, either of the wife or daughter.

I do not mean to say that the patent so given out would create a legal title in all claimants from the first—by no means—but only this: that, being given out, it sought the equitable title in whosesoever hands, not to change or modify the rights of those holding the equities, but simply to perfect them as they were—the legal title conforming to the equities as to liens, mortgages, defeasances, or liabilities to defeasances, if any existed, according to the nature of the equitable title held. To say otherwise would be to hold that the State has committed an error in conveying the estate to the wrong parties, and that the equitable and legal estates are still divided.

The estate, then, of the latest heir of any one of the "legal representatives" is in no way different from what it would be if the legal title had been given out in the first instance. The title has been in the family of the "legal representatives," at first equitable, and then legal and equitable. The nearer heir devests a proper proportion from wherever it was, and as it is, a perfect legal title.

I think I need not pursue this further, as I presume no question can rise upon it; perhaps none will be made. Such questions have arisen so often in this court, and been so often decided, that I cannot consider it incumbent upon me to present either comment or authority.

Another point presented is, how much plaintiff in error is entitled to recover.

The defendant put in evidence the will of Alexander Wolcott, —by which he devised one-half of his freehold estate to his wife, and one-half to his daughter,—for the purpose of showing that the daughter owned but one-half the property; thus reducing the amount that plaintiff could recover.

The suggestion made by plaintiff is, that this equitable title is not a freehold estate. A freehold estate is a legal estate accom-

panied with livery of seizin. Although our statute has rendered livery of seizin unnecessary, and the owner is constructively in possession of his land, yet it is the owner of the *legal* title; so an equitable title does not constitute a freehold. If the latitude given to construction of wills, to give effect to the intention of the devisor, be appealed to, I say we may look to the property and discover what he referred to. For this purpose, plaintiff offered in evidence a certified copy of a patent from the State of Virginia, granting several hundred thousand acres of land to the devisor. So it appears that he had a large amount of freehold estate, and sufficient for his family. The design of the testator is discovered. Without violence the words of the will are found to have a meaning, and are satisfied. Whatever construction might be given to the like words, under other circumstances, I contend that no such forced meaning can be given to them here. If it be held that the plaintiff has a right to recover at all, he should recover as the direct heir of his half-sister, one-third of what belonged to her. If the interest which was of Wolcott descended to her as his heir, it should be one-third of the whole estate; the mother taking two-thirds. If the daughter took by devise one-half only, then he should recover one-sixth of the whole estate.

The defendant gave in evidence a deed by Mrs. Wolcott to David Hunter, the design of which was not very apparent. If the design was to give force to his doctrine of commercial advantages, which, however moderate in quality it may be, seems his most hopeful defence, my argument is two-fold. First, it matters not with the plaintiff as to his lawful right, whether she conveyed or not. His claim cannot thus be defeated, or in anywise affected.

And second, it is not a conveyance, as is pretended. She professes to convey only what answers this description. First, the husband died seized or possessed of it; and it is this interest *alone* that she conveys. There is no proof that he was possessed or seized of this property. The equitable title, which alone he had, did not

draw to him the possession, constructive or otherwise, and so this description does not cover this property.

And ~~third,~~ second if a description is sought in the second clause, I say that this is defective to the same extent. She affects to state only that she intended to convey what she was seized and possessed of, and there is no evidence that she was seized or possessed of this property. She held but the equitable title, and this title did not draw to her the possession.

And, ~~fourth,~~ further it may be said with propriety, that this clause in terms does not effect a conveyance, whatever the intention may have been, apt words not having been used for that purpose, as the law requires. Some stress seems to have been placed on the fact that the deed contained covenants of warranty. It matters not. Neither the warranty nor the *habendum* could be suffered to enlarge the premises or grant. Whether or not the case will necessarily involve a judicial construction of the will and the Hunter deed upon the points made, the plaintiff is desirous that it be given.

Upon many of the points made I have quoted no authorities, because, before this Honorable Court, I could not deem it necessary.

Having stated fully my points, in closing, I will repeat only this: The plaintiff in error claims that he is entitled to recover the undivided one-third part of whatever was of his sister's estate, (clothed as it has since been with the legal estate,) the mother having taken two-thirds of it under the statute. He asks that his rights may be declared according to law, and that the judgment below be reversed, and a new trial awarded.

CORYDON BECKWITH,

Att'y for Plaintiff in Error.

IN THE

Supreme Court of the United States.

KINZIE BATES, *Plaintiff in Error.*

vs.

WILLIAM H. BROWN, *Defendant in Error.*

No. 412.

Argument for Defendant in Error.

Beach & Barnard, Steam Printers, Nos. 122 & 124 So. Clark St.

IN THE

SUPREME COURT OF THE UNITED STATES,

December Term, A. D. 1866.

KINZIE BATES, *Plaintiff in Error*,

vs.

WILLIAM H. BROWN, *Defendant in Error.*

No. 412.

Argument for Defendant in Error.

The questions in this case arise under the laws of the State of Illinois, relating to the inheritance and distribution of the estates of persons dying intestate, who owned real estate at the time of their decease, situated within that State.

This was an action of ejectment, and the plaintiff in error claims title to the premises in question under a rule of the common law, generally known as that of "shifting inheritance," while the defendant denies that any such rule exists in the State of Illinois, and insists that the case is within the provisions of the Illinois Statute of Wills, passed January 23d, 1829, and found in the Revised Laws of Illinois, edition of 1833, page 625, section 43.

The facts are these: On the 29th day of September, 1830, Alexander Wolcott, of Chicago, in the State of Illi-

nois, purchased of the State of Illinois several parcels of land, including the premises in dispute—then and still known as "canal lands"—paid the purchase money, and received the usual certificate issued in such cases, by virtue of the provisions of a statute of Illinois, approved Jan. 22, 1829, sec. 7. See Purple's edition of the Statutes of Illinois, 1856, vol. 1, page 422, section 19.

This purchase vested in Wolcott an equitable estate in the premises. He died on the 30th October, 1830, leaving a widow, Ellen M. Wolcott, and one child, Mary Ann Wolcott, then about five years old.

That child died January 16th, 1832, being then about seven years old, and, of course, without issue, and intestate.

Wolcott left a will, which was admitted to probate, in the proper office, April 27th, 1831, by which he devised to his said wife and daughter: first, all his personal estate, to be equally divided between them; and, secondly, all his "freehold estate," also to be divided equally between the same parties.

If a valid devise was made, by this will, of the property in question, then the widow and child each took one-half of the estate, as devisees; but if there was not, then the widow had only her dower in the lands left by her husband, and the fee descended to the child, who held it until her decease, when it descended to her mother, according to the statute of wills cited above.

In either case, the entire estate was vested in the mother on the death of her daughter, as follows: If the will took effect, the mother then held one-half of the estate, as the devisee of her husband, and the other half as the heir of her daughter; if it did not, she held the whole, as heir of her daughter.

After the death of her daughter, on the 13th day of May, 1833, Mrs. Wolcott made and executed a warranty deed to David Hunter, which the defendant insists conveyed to Hunter the premises in question, though not by a particular description. The deed is fully set out in the record; and, for the present, we shall assume that it conveyed to Hunter the full title to the premises in question.

After that, on the 26th day of May, 1836, Mrs. Wolcott married George C. Bates, and the plaintiff was born as the issue of such marriage, on the 13th day of April, 1838. His parents had no other children, and his mother died August 1st, 1860.

The only other fact, necessary to be noticed, is this, that on the 5th day of July, 1833, a patent was issued by the Governor of the State of Illinois, for the lands in question, "to the legal representatives of Alexander Wolcott, de-"ceased," which vested the legal title in such legal representatives, whoever they were.

This patent was issued after Mrs. Wolcott had made the deed to Hunter, and before her marriage with Bates. The defendant insists that the legal estate, which was conveyed by it, enured to Hunter, as the grantee of Mrs. Wolcott, by virtue of the covenants in her warranty deed to him.

The plaintiff insists that, upon his birth, the estate, which his mother inherited from his deceased half-sister, was "shifted" from his mother's grantee to himself, by force of the rule stated in 2 Blackstone, 208, side, which is as follows:

"Heirs presumptive are such who, if the ancestor should "die immediately, would, in the present circumstances of "things, be his heirs; but whose right of inheritance may "be defeated by the contingency of some nearer heir be-"ing born, as a brother or nephew, whose presumptive

" succession may be destroyed by the birth of a child, or " a daughter, whose present hopes may be hereafter cut " off by the birth of a son. Nay, even if the estate hath " descended by the death of the owner, to such brother, " or nephew, or daughter, in the former cases, the estate " shall be devested, and taken away by the birth of a pos- " thumous child; and in the latter, it shall also be totally " devested by the birth of a posthumous son."

The rule is stated as follows, in 3rd Cruise's Digest, side, 375, old edition: " A descent may be defeated by the " birth of a nearer heir."

The plaintiff applies that rule to this case, as follows: Mrs. Wolcott took and held the estate which she inherited from her daughter, subject to be defeated by the birth of the plaintiff, and not absolutely in her own right; and on the plaintiff's birth, that inheritance was " shifted " from Mrs. Wolcott—if she still held it—or from her grantees, if she had conveyed it, to the plaintiff, who might immediately recover it by the proper action.

The defendant insists that the Illinois statute of wills, which was in force at the time of the death of Mary Ann Wolcott, in January, 1832, was a complete scheme or system of descents; and that by the provisions of that law, the plaintiff's mother inherited the estate from her deceased child, and held it absolutely in her own right, with full power to dispose of it, by deed, or otherwise; and that her deed to Hunter conveyed to him an indefeasible title, as well against the plaintiff, as any other children which she might have after that time.

The words of that act are plain and comprehensive. We give the section in full.

Section 43, Laws 1833, page 625:

" Estates, both real and personal, of resident or non-resi-
" ident proprietors in this State, dying intestate, or whose
" estates, or any part thereof, shall be deemed and taken
" as intestate estate, and after all just debts and claims
" against such estate shall be paid as aforesaid, shall de-
" scend to and be distributed to his or her children, and
" their descendants, in equal parts; the descendants of a
" deceased child, or grand-child, taking the share of their
" deceased parent in equal parts among them; *and when*
" *there shall be no children of the intestate, nor descend-*
" *ants of such children, and no widow, then to the parents,*
" *brothers and sisters of the deceased person, and their de-*
" *scendants, in equal parts among them, allowing to each of*
" *the parents, if living, a child's part, or to the survivor of*
" *them, if one be dead, a double portion,* and if there be no pa-
" rent living, then to the brothers and sisters of the intestate
" and their descendants; when there shall be a widow, and no
" child or children, or descendants of a child or children of
" the intestate, then the one-half of the real estate, and the
" whole of the personal estate, shall go to such widow as
" her exclusive estate forever, subject to her entire and
" absolute disposition and control, to be governed in all
" respects by the same rules and regulations as are, or
" may be provided, in cases of estates of *femes sole;* if there
" be no children of the intestate, or descendants of such
" children, and no parents, brothers or sisters, or descend-
" ants of brothers and sisters, and no widow, then such
" estate shall descend in equal parts to the next of kin to
" the intestate, in equal degree, computing by the rules of
" the civil law; and there shall be no representation among
" collaterals, except with the descendants of the brothers
" and sisters of the intestate; and, in no case, shall there
" be a distinction between the kindred of the whole and

" half blood, saving to the widow, in all cases, her dower " of one-third part of the real for life, and the one-third " part of the personal estate forever."

Mary Ann Wolcott left "no children," nor "descendants of such children," and "no widow," and in such cases, the estate descended to the parents, brothers and sisters of the deceased person; but she left no brothers or sisters, only one parent, her mother, who was her sole heir.

This very case was, therefore, within the express provisions of the law; and by that law alone, must the rights of the parties be determined.

We insist that Mrs. Wolcott inherited the estate absolutely in her own right, and did not hold it in trust, or contingently for her after-born children.

Any other construction of the law, would tie up the estate in her hands, or those of her grantees, and also, in all similar cases, until that indefinite period, when widows refrain from marrying, or, if married, cease to have children; for, until that time comes, no one can tell what will not happen, and so the estate will be unsaleable and unimproved.

Posthumous children were enabled, by section 50 of that Statute of Wills, (Laws 1833, page 627) to inherit their father's estate, the same as if they had been born in his lifetime; so that the scheme of descents established by that law, seems to be complete and just in all its parts; and as it makes no provision for "shifting" an inheritance which has once vested, it does not seem proper to invoke the aid of an almost forgotten feudal rule, to defeat the purposes of the legislature.

If the law is allowed its simple and direct operation upon the estates of persons dying intestate, it will be easy

to determine who are the owners of such estates, and purchasers will be safe in buying them of the heirs, to whom they descended on the death of the owner; but if the fact of heirship is to be determined not by the state of things at the time of his death, but on such uncertain events as the subsequent marriage and birth of children to those who at present appear to be the owners of an estate by inheritance, it will be impossible to tell in some cases, for many years, in whom the estate will absolutely vest; and this state of titles, too, is alike opposed to the policy of legislation, and our landed interests.

Certainty as to the ownership, and simplicity as to the means of transferring titles to real estate, are the two leading objects of all the legislation upon this subject, in the different States of the Union; and the courts should not allow those objects to be defeated by any rules of descent, inconsistent with our policy and state of society, much less by rules, which are altogether opposed to the laws of descent expressly enacted by our legislatures.

We think the following propositions are well supported by authority, and are applicable to the case:

"The descent and heirship of real estate is exclusively "governed by the law of the country, within which it is "actually situate. No person can take, except those who "are recognized as legitimate heirs, by the laws of that "country, and they take in the proportions, and the order "which those laws prescribe."

Story's Conflict of Laws, Sec. 483;
United States v. *Crosby*, 7 Cranch., 115;
McCormick v. *Sullivant*, 10 Wheaton, 192;
Kerr v. *Moon*, 9 Wheaton, 565;
Oakey v. *Bennett, et al*, 11 Howard, 33;
2 Washburne on Real Property, 413.

The common law of England, so far as the same is applicable and of a general nature, has been declared to be the rule of decision, and in full force in the State of Illinois, until repealed by legislative authority. Laws 1833, page 425—Revised laws, 1845, page 337.

In *Seeley* v. *Peters*, 5 Gilman, 130, the Supreme Court of Illinois decided, that the common law relating to division fences, was impliedly abolished by the legislation upon that subject, which was inconsistent with it; much more should it be held that express legislation shall prevail over the common law rules of descents, as to all cases within the scope of the statutes.

The Supreme Court of Illinois has always looked to the statutes of that State, to determine who are the heirs of persons dying intestate.

Lesher v. *Wirth*, 14 Illinois, 39;
Tyson et ux. v. *Postlethwaite et al.*, 13 Ills., 728;
Detrick v. *Migatt, et al.*, 19 Ills., 146;
McConnel, et al., v. *Smith Adm'r*, 23 Ills., 611;
Paschall v. *Hailman*, 4 Gilman, 285.

In the last case it was decided that the estate of an intestate is to be distributed according to the laws in force at the time of his decease, which accords with the general law on this subject.

2 Washburne, on Real Property, 413;
Miller v. *Miller*, 10 Metcalf, 393.

We insist that the Illinois Statute of Wills—in force at the time Mary Ann Wolcott died—controlled the descent and inheritance of her estate, without qualification or restriction by any inconsistent common-law rule.

Whatever that rule may have been, as derived from the feudal law, the rule established by the English Statute of Distributions (22 and 23 Car., II., c. 10), as construed by the courts, was different, and except infants "*en ventre sa mere*," at the time of the ancestor's death, only those heirs who were living at the time of the descent cast, inherited the estate, and their shares were not to be diminished by afterborn heirs of the same degree.

This will be seen by reference to

Reeve on Descents, Introduction, page 71 to 75;

Burnet v. *Mann*, 1 Vesey, Sen., 157.

"The child must be in *rerum natura*, at the death of the "intestate brother, whose estate is in question."

Wallis v. *Hudson*, Barnaediston Ch'y, 272.

Judge Reeve states his opinion thus: "I am of opinion, "that such posthumous children, who were born at the "time of distribution, were entitled, and none others" (p. 74, Introduction).

This being the construction of the English statutes, it furnishes a rule for construing those of Illinois, on the same subject, and the Supreme Court of that State has decided that posthumous children inherit directly from the father, and not from their brothers and sisters.

Detrick v. *Migatt*, 19 Illinois, 146;

McConnel, et al., v. *Smith*, admin'r, 23 Ill., 613.

They are regarded as if living at the time the descent is cast. There is no "shifting" of an inheritance to them, which has once vested in others.

It seems to us, to be argument enough on this part of the case, to show, that the descent of the estate to Mary Ann

Wolcott, was within the scheme and plan of descents established by the law of 1829. Such statutes are everywhere regarded as controlling the descent and distribution of property within the several States, in all cases which come within their provisions; and this upon the theory, that such laws are the supreme and paramount laws of the land.

The Illinois Statute of Wills is remarkable for its brevity and comprehensiveness. Other States have failed to include all the cases that arise, by attempting too much—to anticipate and provide for all possible cases; and the different phases of human life have often proved more numerous than the wisdom of the legislature foresaw.

Hence the litigation under the Maryland Statutes of Descent, which is reported in 7 Cranch, 456, *Barnitz's lessee* v. *Casey;* and in *Brewer's lessee* v. *Blougher*, 14 Peters, 178, which were cited and relied upon by the plaintiff below.

This overreaching particularity of legislative provisions, also led to the litigation in the case of *Dunn* v. *Evans*, 7 Ohio, 169, a case much relied upon by the plaintiff in error, but which has been overruled by the case of *Drake et al* v. *Rogers*, 13 Ohio State Reports, 38.

The legislatures of Ohio and Maryland had framed very carefully-drawn systems of descent, but failed to include all cases; at least, very seriousquestion was made, whether the cases presented were provided for or not.

It was admitted, in all the decisions referred to, that, if the cases were included within the law, they must be governed by it.

We conclude our argument, on this part of the case, by saying that, while the plaintiff may be able to find a few cases, which have been decided in this country, recognizing the rule of "shifting inheritances," they have all been

decided upon the ground, that the statutes of the States in which they arose made no provision for the cases in question. It was so in North Carolina, *Cutlar et al.* v. *Cutlar*, 2 Hawks, 324; *Caldwell* v. *Caldwell*, 5 Iredell, 463—and in Ohio, when the case of *Dunn* v. *Evans et al.*, 7 Ohio 169, was decided.

In the case of *Drake et al* v. *Rogers*, 13 Ohio State, 21, Chief Justice SUTLIFF used the following language:

"I have always supposed the object of our statutes of "descent to be, to determine and point out the represent- "atives of the person dying intestate, having title to any "real estate of inheritance within this State; I have al- "ways regarded the office of our statutes of descent to be, "to invest the representatives of the intestate *instanter*, "upon the death of the intestate, with the *same* title of "which the intestate died seized; and when the statute "has done this, its office is fully discharged in that case, "and it becomes *functus officio* as to such intestate's pro- "perty, and can only be again called into operation to "transmit the title to the same property, upon such rep- "representative dying intestate, and seized of the property. "In such a case, the statute may again designate and de- "termine *his* representatives, and in like manner, trans- "mit the same property to them. But I deny that after "the title by force of the statute has been transmitted to, "and vested in the legal representative, at the time of the "death of the intestate, the statute of descents, before he "shall die intestate, and while he is yet living and seized "of such lands in fee simple, operates to divest him of "such title and transmits the title to another person. "Under the laws of this State, I think it is contemplated "that such change of title from one living person to an- "other, is to be made by deed duly executed, rather than "by our statutes of descent" * * * *

"An heir's title under our statute, upon reason and "authority, ought to be as perfect as it would have been "by deed of gift from the ancestor, at the time of his de- "cease, passing the title from him while yet living. An "heir being the person upon whom the law casts the "estate, immediately on the death of the ancestor, would "only take the title upon the death of the ancestor, while "the grantee, in the case supposed, would take the title "immediately before the death of the ancestor. Yet both "the heir and the grantee in the cases supposed, would, "by force of the statute law of this State, have acquired "all the right and title held by the ancestor; and in each "case the party would hold his title without having paid "value, but by acquiring the title according to the statute "—and in either case, after having so lawfully acquired "the title, the party would, by the law of the State, be "the legal owner of the property" * * * * "While, "therefore, our statutory rules of descent reject the can- "ons and supersede the common-law rules of inheri- "tance, it seems hardly a logical conclusion that the same "statutory rule is to be itself superseded by a common-law "rule of descent; much less by the doctrine of shifting "inheritances, a mere incident of the canons of descent"; (pp. 33, 34, 35.)

The rule is not recognized by Kent, Washburne, or any other writer upon the law of descents as existing in this country.

It was contended for in the case of *Cox, et al.*, v. *Matthews, et al.*, 17 Indiana, 367 (1861), and was repudiated by that court in the following language:

"The feudal policy of tying up estates in the hands of "a landed aristocracy, and which had much to do with the "doctrine of shifting descents, as recognized by the *Eng-*

"*lish* canons of descent, is contrary to the spirit of our "laws, and the genius of our institutions. It has been the "policy, in this State, and in this country generally, not "only to let estates descend to heirs equally, without refer- "ence to sex or primogeniture, but also to make titles "secure and safe to those who may purchase from heirs "upon whom the descent may be cast. Our laws have "defined and determined who shall inherit estates upon "the death of a person seized of lands. When those thus "inheriting make conveyances, the purchasers have a right "to rely upon the title thus acquired. If titles thus ac- "quired could be defeated by the birth of nearer heirs, "perhaps years afterwards, great injus ice might, in many "cases, be done, and utter confusion and uncertainty would "prevail in reference to titles thus acquired. We are of "opinion that the doctrine of shifting descents does not "prevail under our laws, any more than the other *Eng-* "*lish* rule, that kinsmen of the whole blood, only, can "inherit."

See also, 4 Kent, 374: "In the United States, the "English common law of descents, in its most essential "features, has been universally rejected, and each state "has established a law of descent for itself."

The cases are almost countless in which it has been held that, the various statutes of the States furnish the rules of inheritance, as to all cases within their provisions.

Cook v. *Hammond*, 4 Mason, 467;
Eyre and ux., v. *Storer and ux.*, 37 N. H., 114;
Whitney v. *Whitney*, 14 Mass., 88;

—are all we think it necessary to cite in addition to those referred to above.

The plaintiff claims title as the heir of his sister, who died several years before he was born. At the time of her decease, the descent was cast upon her mother, who was then, within the statutes of Illinois, her sole heir, and who was then, as to all the world, the absolute owner of the estate, and conveyed it to David Hunter, and the parties claiming under him have held the title for more than thirty years, relying upon the laws of Illinois as furnishing the only rule of inheritance protecting their rights.

Mrs. Wolcott was the only heir of her child at the time the descent was cast upon her. Her child did not, and could not have had any posthumous heirs, and being thus vested with the estate by virtue of the law of Illinois, she had the power to convey it, without restraint by any foreign and inconsistent rule of inheritance, impairing or qualifying her title.

II.

The deed of Mrs. Wolcott to Hunter, was sufficient to convey to him all her interest in the premises and estate in question. See the following clauses of the deed: "All her right, "title, claim and interest, both at law and in equity, "which she has by will, indenture, or otherwise, by, from, "or through her deceased father, John Kinzie, or her de- "ceased husband, Alexander Wolcott, of and to all the "real estate of which they, or either of them, died seized "or possessed, lying and situate in the town of Chicago, "Cook County, and State of Illinois."

"The grantor intending, by these presents, to convey "all the real estate of which she is seized and possessed, "lying and being, and situate, in the county of Cook, "and State of Illinois."

Such general words of description have very lately been held sufficient to pass such an interest as Mrs. Wolcott held in the demanded premises, by the Supreme Court of Illinois.

Prettyman v. *Walston*, 34 Illinois, 175;
2 Washburne on Real Property, 2d edition, 670–1;
Jackson v. *DeLancey*, 11 Johnson, 365.

The deed shows plainly that the grantor intended to convey to Hunter all the real estate she had in Cook county, Illinois, and as she used apt and sufficient words for that purpose, the deed operated as a grant of the premises in question, and after that she had no estate in them which could descend to her afterborn heirs.

III.

The words in Wolcott's will, "all my freehold estate," were sufficient to vest in his devisees, all his interest at the time of his death in the premises in question.

These words should not be controlled by anything that appears in the so-called patent from the State of Virginia, offered by the plaintiff, nor by any inferences drawn from the assumption that he was the owner of the lands described in the so-called patent; for if those lands were Wolcott's "freehold estate," so were the premises in question, and the words of his will are sufficiently comprehensive to pass his title in all of it.

He had paid all the purchase money, and was the owner of the complete equitable title, which would descend to his heirs, or might pass by those words of devise. A freehold

estate is one of which a man is seized, and may be as well an equitable, as a legal estate.

Nicoll v. *Ogden et al.*, 29 Ill., 377–8;
4 Kent's Commentaries, 22;
2 Redfield on Wills, 688, and following.

IV.

It has been often decided in this court, in effect, that when the patent was issued by the State of Illinois to the legal representatives of Alexander Wolcott, the fee thus conveyed enured to the benefit of those persons who held the equitable estate previously vested in him. That estate had been vested in his widow, and she had conveyed it to Hunter by a warranty deed, and the legal estate enured to him by virtue of the covenants of warranty.

Landis v. *Brant*, 10 Howard, 348;
Stoddard v. *Chambers*, 2 Howard, 316;
Morehouse v. *Phelps*, 21 Howard, 294.

The plaintiff is not one of the "legal representatives" of Alexander Wolcott, is not his child, nor in any way related to him. There is no privity of blood between him and Wolcott, and there is no privity of estate, because the plaintiff claims, not as the heir of Alexander Wolcott, but as the heir of his child, which brings us again to the point from which we started, whether, under the laws of Illinois, Mary Ann Wolcott had any heirs except those living at the time of her death, and the descent cast?

We think she had not, and that those persons to whom the estate then descended, were vested with an absolute title to it under the laws of Illinois, which no inconsistent rule of the common law could impair or diminish.

The judgment below should be affirmed.

SAM. W. FULLER, *for Def't in Error*,
H. F. MATHER, *of Counsel.*